

**Docket No:** 02-0160  
**Bench Date:** 4/10/02  
**Deadline:** N/A

**MEMORANDUM**

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**TO:** The Commission

**FROM:** Leslie Haynes, Administrative Law Judge

**DATE:** April 5, 2002

**SUBJECT:** Z-Tel Communications, Inc.  
-vs-  
Illinois Bell Telephone Company, d/b/a Ameritech Illinois

Verified Complaint and Request for Emergency Relief  
Pursuant to Sections 13-514, 13-515 and 13-516 of the  
Illinois Public Utilities Act.

Z-Tel Communications, Inc.'s Emergency Petition for  
Interlocutory Appeal of Administrative Law Judge Ruling

**RECOMMENDATION:** Deny Petition for Interlocutory Review.

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Z-Tel Communication, Inc. ("Z-Tel") filed a Petition for Interlocutory Review ("Petition") on March 22, 2002. As the caption indicates, this proceeding was filed pursuant to Sections 13-514, 13-515 and 13-516 of the Illinois Public Utilities Act. The Commission has adopted specific rules, Part 766, for actions filed pursuant to Section 13-515. (83 Ill. Adm. Code 766). Under these rules, interlocutory review of an Administrative Law Judge's ruling is not allowed. The rule states the following:

**Section 766.25 Interlocutory Review Not Allowed**

The Commission shall not conduct any interlocutory review of any rulings made by a Hearing Examiner in any proceeding filed pursuant to Section 13-515 of the Act. Section 200.520 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.520) is not applicable to any proceedings subject to this Part.

For this reason, the Commission should not act on the Petition. Because of the very short timeline involved here and for clarity in future 13-514 cases, the Commission needs to enforce the rule in this proceeding. Given the specific prohibition against Interlocutory Review in a Section 13-514 proceeding it is obvious that the legislature

realized that there is not ample time for an ALJ to write a decision in 60 days as well as entertain petitions for interlocutory review.

However, if the Commission disagrees, I provide the following analysis.

### **The Petition for Interlocutory Review**

On March 15, 2002, Z-Tel filed a Motion to File its First Amended Complaint and to Bifurcate the Hearings ("Motion") in this matter. The Motion sought to amend the Complaint by changing Counts 1 and 2 and adding Count 3. Count 3 of the Complaint alleges that Ameritech has violated Sections 9-241, 9-250, 9-251, 9-252, 9-252.1, 9-253, 10-101, 10-108, 13-514 and 13-801 of the Act. Z-Tel also requested in its Motion, that the proceeding be bifurcated to address Counts 2 and 3 at a later stage, outside the time frames required by Section 13-515.

Ameritech did not object to the changes made to Counts 1 and 2, however, it did object to the adding of Count 3 and bifurcating the proceeding. The ALJ granted the Motion as to amending Counts 1 and 2, but denied the addition of Count 3 and bifurcating the proceeding on March 21, 2002.

In its Petition, Z-Tel maintains that the right to amend a complaint is very broad and is allowed on just and reasonable terms. Z-Tel argues that if its Petition is denied, the doctrine of res judicata will prohibit Z-Tel from raising the claims in Counts 2 and 3 in another proceeding. Furthermore, because the damages are of an ongoing nature, Z-Tel contends that it cannot adequately calculate its damages in the timeframe of a 13-514 complaint and should be dealt with at a later time.

### **Ameritech's Position**

Ameritech argues that Z-Tel's Motion was untimely. Ameritech also contends that although the right to amend is broad, whether it should be allowed is within the discretion of the trial court. Ameritech states that given the untimeliness and prejudice to Ameritech, the Motion to file the new Count 3 should be denied.

As to bifurcation, Ameritech maintains that it would be highly prejudicial and violate due process if it were allowed. Counts 1, 2 and 3 contain the identical factual allegations and request the identical relief and consequently there can be no prejudice to Z-Tel from trying these counts together. Administrative efficiency, according to Ameritech, requires that this proceeding not be bifurcated because the counts allege the same facts and seek the exact same relief.

Ameritech did not respond in writing to the Petition for Interlocutory Review, however at the hearing on March 25, 2002, Ameritech stated that its position was that, under the Commission's rules, interlocutory review is not authorized and should be rejected. Ameritech also argued that failure to seek interlocutory review is not a waiver

and that the appropriate time for Z-Tel to raise these arguments is when the case goes to the Commission.

## Analysis

Z-Tel's Motion was untimely. Actions filed pursuant to Section 13-514 are subject to the timelines contained in 13-515(d)(7). The time limits contained therein are very strict and short. The hearing must commence within 30 days of the filing of the Complaint and the ALJ's decision must be issued within 60 days. Z-Tel's Motion was filed on March 15, 2002 – 21 days after the Initial Complaint was filed and a mere 10 days before the hearing. Ameritech has refused to waive the timeframe as contained in the statute. Therefore, the ALJ's Order in this proceeding must be issued by April 23, 2002. There is simply not time for additional counts to be added 21 days into a 60 day proceeding.

Z-Tel's Count 3 pleading is insufficient. The Commission's rules contain the following requirement for formal complaints:

A plain and concise statement of the nature of each complainant's interest and the acts or things done or omitted to be done in violation, or claimed to be in violation, of any statute, or of any order or rule of the Commission. (83 Ill. Adm. Code 200.170).

Z-Tel, in Count 3, has failed to meet this requirement. Count 3 lists many sections of the statute, but fails to explain in what manner Ameritech has violated these sections. For instance, Count 3 alleges that Ameritech has violated Section 9-241 of the Act. Section 9-241 only prescribes the granting of "preference or advantage" among customers. (Citizens Utility Board v. Illinois Bell Telephone Company, Docket 00-0043, Order January 23, 2001) (Re Illinois Bell Telephone Company, Docket 94-0096, 94-0117, 94-0146 consol., Order April 7, 1995). The Complaint does not contain any reference to how another customer of Ameritech is receiving a preference or advantage from Ameritech. Even when ones reads the factual allegations contained in the Complaint in a light most favorable to Z-Tel, it is impossible to discern what possible cause of action Z-Tel has under Section 9-241 of the Act.

Further, Count 3 alleges violations of irrelevant statutory sections. Section 10-101, which Z-Tel alleges Ameritech has violated, contains a general statement of the powers of the Commission and the applicability of the Illinois Administrative Procedure Act. Similarly, Z-Tel alleges that Ameritech has violated Section 10-108 of the Act, which outlines the procedures for filing a complaint.

Z-Tel has not shown this it is prejudiced by the denial of Count 3. In Count 3, Z-Tel claims that Ameritech has violated 10 sections of the Act. Notably, 9 out of 10 of the sections are claimed to have been violated by Ameritech in Counts 1 and 2. Z-Tel does not explain why the claims in Count 3 are different from those alleged in Counts 1 and

2. The only section that is new in Count 3 is Section 9-253, but this section deals with the manner in which refunds should be paid. Ameritech cannot violate this section until a refund has been ordered. Regardless of whether Count 3 is added or not, Z-Tel's results will be the same. In each count, Z-Tel seeks the same relief. Z-Tel requests no additional remedy in Count 3.

Z-Tel argues that the doctrine of res judicata prevents Count II and III from ever being decided. The Petition states that: "The Commission will eventually issue an order on the merits of Count I while not addressing the Count II or II claims which may arise out of the same set of facts and circumstances." This is incorrect; the ALJ decision that will be issued on April 23 will address Count 2.

Bifurcating this proceeding is inappropriate. Z-Tel chose to file its claim pursuant to Section 13-514. One of the reasons for making this choice presumably was to take advantage of the emergency relief allowed under 13-515. However, once Z-Tel has made this choice it also is bound by the time constraints contained in 13-515. Although parties may waive these time constraints, Ameritech has refused. Z-Tel cannot avoid these timelines by bifurcating its claims.

The Commission granted a modified form of the emergency relief that Z-Tel requested. Pursuant to that Order, Ameritech is required to delay sending winback materials for 17 days from when it loses a customer to Z-Tel. Ameritech has extended this to include all CLECs in all five Ameritech states. (Tr. 38). Ameritech is no longer gaining a marketing advantage through the use of superior information.

It is also in Z-Tel's interest to pursue its claims under Count 2 as a violation of 13-514(8) and not bifurcate the complaint. If Z-Tel wants remedies pursuant to Section 13-516 such as damages and attorney's fees, it must remain a 13-514 complaint.

Furthermore, administrative efficiency requires that both Counts 1 and 2 be tried at the same time. The exact same set of facts are alleged in all three counts and the same relief is requested in all three counts. Z-Tel has not explained how its factual showing at hearing would be any different for Counts 2 and 3. Z-Tel contends that its damages in Count 2 and 3 are ongoing and therefore the calculation of damages should be bifurcated. However, under Z-Tel's bifurcation plan, it must fully litigate Count 1 during the 60 day timeframe. Given that the same facts are alleged and the same relief is requested for all 3 counts, it is unclear how it could prove its Count 1 damages and not its Counts 2 and 3 damages.

Therefore, in the event the Commission decides to rule on the merits of Z-Tel's Petition for Interlocutory Review, I recommend that it be denied.

LH:jt